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No. 08-1128

IN THE

# Supreme Court of the United States

JOHN K. BROAD, individually; and DEVAN HENDERSON, individually,

*Petitioners*,

v.

GLEN WEIGEL and DAVID WEIGEL, as Co-Personal Representatives of the Estate of Bruce James Weigel, Deceased,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, MARYLAND, MICHIGAN, MONTANA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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## QUESTIONS PRESENTED

1. Whether, under *Hope v. Pelzer*, it is proper for a court, in a qualified immunity analysis, to elevate and equate police training to the status of clearly established law.

2. Whether the Court of Appeals applied the proper standard in determining that the Troopers' conduct was objectively unreasonable in light of this Court's recent decision in *Scott v. Harris.*

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## INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Montana, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Washington, Vermont and West Virginia respectfully submit this brief as *amici curiae* in support of the Petition. State and local police officers confront on a daily basis crises involving belligerent offenders who threaten innocent bystanders, attack police, and even harm themselves. In such situations, officers must, as Troopers Broad and Henderson had to do here, balance concerns for public and self against the rights and well-being of the assailant. They must weigh the likely consequences of doing nothing—both in terms of the concrete potential for immediate danger to persons and property and in terms of addressing crime more abstractly—against the risks associated with multiple available tactics for ending the crisis. Often they must, as here, undertake these multivariate calculations in mere seconds under great stress and in the midst of rapidly evolving confrontations, all the while minding numerous simultaneous threats to all concerned.

The Fourth Amendment and qualified immunity issues presented in this case have a critical impact on these split-second decisions. If officers must act based on the premise that any use of force resulting

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief more than 10 days prior to the due date of this brief.

in positional asphyxia may well be deemed *post hoc* to be deadly force, that will alter how they defend themselves and the public. To be sure, it may lead to greater alacrity in repositioning belligerents once they have been secured so as to reduce the risk of asphyxia, but it may also induce officers to draw firearms more quickly as an unequivocal means of securing the upper hand. Many, if not all, police agencies train officers in "progressive" uses of force, whereby police resort to greater and greater force (and threats of force) only as necessary to address an escalating potential for violence in a given situation. But if those teachings have the unintended consequence of generating "clearly established" rights for targets of police action—as the Tenth Circuit decided here—police agencies will have a disincentive to train officers to delay a clear demonstration of control over a given situation even in a seemingly innocuous encounter with the public.

The Court has in recent years struck a reasonable balance between officers' need for leeway in protecting themselves and the public in situations that turn violent or dangerous, *see Scott v. Harris*, 550 U.S. 372 (2007), and the rights of individuals to be free from unnecessary force, *see Hope v. Pelzer*, 536 U.S. 730 (2002). Even this term's decision in *Pearson v. Callahan*, __U.S. __, 129 S.Ct. 808 (2009), improves the police-discretion/individual-rights calibration by authorizing lower courts to refrain from finding new Fourth Amendment rights when qualified immunity affords a more obvious resolution of the matter. The decision below, however, contravenes this trend and opens police to civil liability when they act under great stress to protect

themselves and the public, but where their actions in doing so unfortunately result in the death of the person causing the disturbance.

States and their police agencies are interested not only in the general balance courts strike in Fourth Amendment and qualified immunity cases, but also more particularly in the reasonableness of police control techniques that pose a risk of positional asphyxia in some circumstances. Given that police control frequently must involve physical restraint, officers need to know whether and to what extent the seemingly routine act of securing a violent suspect face-down on the ground may be construed as unreasonable deadly force.

## REASONS FOR GRANTING THE PETITION

### I. The Circuits Are Divided Over The Reasonableness Of Subduing Violent Aggressors Using Force That Can, In Some Cases, Precipitate Asphyxia

As the Petition sets forth, a conflict exists between the Ninth and Tenth Circuits, on the one hand, and the Sixth and Eleventh Circuits, on the other, concerning the proper analysis for concluding whether an official's conduct is "obviously" unconstitutional under *Hope v. Pelzer*, 536 U.S. 730 (2002). Pet. 7-8, 13-15. There is also another circuit fissure, however, identified by the dissent below, Pet. App. 62a-66a, that justifies Supreme Court review: Circuits are in disarray over whether and to what extent police control techniques resulting in

positional asphyxia violate clearly established Fourth Amendment rights.

Even taken alone, either split would warrant this Court's review. Together, these divisions underscore a paramount need for the Court to define with greater clarity the extent to which police may resort to forceful restraint when attempting to subdue dangerous belligerents determined to resist at all costs. The Court has never addressed a positional asphyxia case, but given the unfortunate volume of such cases and the disparate views lower courts have of them, it needs to do so.

### A. The decision below conflicts with positional asphyxia cases from the Third, Fifth, Seventh, and Eleventh Circuits

Fourth Amendment excessive force cases are notoriously fact sensitive and resistant to easy comparisons with other cases. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating that courts must pay "careful attention to the facts and circumstances of each particular case" (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985))). That has not stopped the Court from taking such cases, however. *See, e.g.*, Pet. 10-11, *Scott v. Harris*, 550 U.S. 372 (2006) (No. 05-1631), 2006 WL 1733980 (outlining conflict with cases where car-chase deadly force was gunshot rather than bumper tapping); Pet. at 15-16, *Brosseau v. Haugen*, 543 U.S. 194 (2004) (No. 03-1261), 2004 WL 432026 (claiming conflict with other cases where police shot at dangerous vehicles, notwithstanding other factual variations). And here the Court can be reasonably confident that

the result below would not have been reached by the Third, Fifth, and Eleventh Circuits, and possibly not the Seventh.

1. The Eleventh Circuit, in particular, has been far more deferential to police in positional asphyxia cases than the Tenth Circuit was in this case. Indeed, shortly after Wyoming filed its Petition in this case, the Eleventh Circuit issued an opinion where it found no violation of a clearly established Fourth Amendment right where an incoherent, drug-addled man, after stumbling through a busy intersection, died when police hog-tied him face down on the side of the road. *Lewis v. City of West Palm Beach*, No. 08-12348, 2009 WL 606546 (11th Cir. Mar. 11, 2009). Hog-tying occurs when police handcuff behind the back, then connect the wrists to a hobble restraint (or similar device) that has been applied to the ankles, such that the restrained person's body is bowed with the feet and hands in close proximity behind the back. *See Lewis*, 2009 WL 606546 at *1. Among all the restraint positions associated with custodial asphyxia, hog-tying is among the most closely correlated. *See, e.g., Cruz v. City of Laramie*, 239 F.3d 1183, 1188-89 (10th Cir. 2001).

In *Lewis*, the police applied the hog-tie restraint while kneeling on Mr. Lewis's back, a maneuver that independently carries a risk of inducing positional asphyxia, as the Tenth Circuit observed below. *Lewis*, 2009 WL 606546 at *1; Pet. App. 14a. What is more, police undertook this ultimately fatal course of action because Lewis had been alternately compliant and resistant, but never aggressive. *See Lewis*, 2009

WL 606546 at *1. Notably, unlike Weigel in this case, Lewis had never attacked police or tried to grab their weapons. *Id.*

The contrasts in the modes of analysis are telling. In the decision below, the Tenth Circuit ruled that, notwithstanding Weigel's extreme aggression and the lack of on-point cases establishing a Fourth Amendment right in a similar scenario, any reasonable police officer would have known the force used against Weigel—which never included hog-tying—was excessive. *See* Pet. App. 21a (stating that "the law was clearly established that applying pressure to Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions."). In *Lewis*, by contrast, the court, finding no case law clearly establishing a right not to be hog-tied, observed that "[t]he application of the hobble may not have been entirely necessary; however, the officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right, and they are not an obstacle to the application of qualified immunity." *Lewis*, 2009 WL 606546 at *3.

Furthermore, according to the Tenth Circuit, Weigel's extended display of "superhuman" strength against State Troopers and bystanders along a busy interstate, multiple attempts to grab Trooper Broad's weapon, and repeated attempts to run into high-speed traffic, did not justify Broad's sitting on Weigel's back for at most three minutes in order to restrain Weigel. *See* Pet. App. 19a (stating that a

"reasonable officer would know these actions present a substantial and totally unnecessary risk of death to the person."). But in *Lewis*, the Eleventh Circuit held that hog-tying was justified because the incoherent Mr. Lewis refused "to sit upright and . . . remain calm," such that he "remained a safety risk to himself and to others." *Lewis*, 2009 WL 606546 at *3. According to the Eleventh Circuit, "this was precisely the type of situation where the decisions of the officers confronted with 'circumstances that are tense, uncertain, and rapidly evolving' should not be second-guessed." *Id.* (quoting *Graham,* 490 U.S. at 397). In contrast, the Tenth Circuit recognized that "events leading up to Mr. Weigel's death happened quickly," but rejected the argument that this was a "split second decision[] by law enforcement officers to protect themselves and the public." Pet. App. 20a-21a.

The bottom line is that, given the comparatively greater degree of deference the Eleventh Circuit has afforded police in positional asphyxia cases, there can be little doubt that this case would have come out differently in that court. *See also Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004) (finding no Fourth Amendment violation after police pepper-sprayed, clubbed and hog-tied a violently resisting suspect and left him prone near a running cruiser's exhaust pipe, resulting in his death); *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996) (finding no excessive force as a matter of law where a psychologically impaired arrestee was placed face-down, handcuffed and leg-bound, in the back of a police cruiser with his head in the leg well and died from positional asphyxiation during

transport). The Court needs to take this case to decide whose approach is more on target.

2. The Fifth Circuit also has followed a path in positional asphyxia cases that forks away from the trail blazed by the Tenth Circuit in this case. In *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000), the court found no excessive force where an arrestee who had caused a disturbance at a fast-food restaurant died after police pepper-sprayed him, forced him to the ground face-down, knelt on his back, pressed against his neck with a baton, and finally loaded him into the back of a police car face down, resulting in positional asphyxia. Like the Eleventh Circuit, the Fifth Circuit was "careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a violent individual." *Id.* at 321. It concluded that the force used was not "deadly," the arrestee's death notwithstanding, because the usual warning signs for positional asphyxia (such as cocaine-induced psychosis or drug use) were not apparent and "the officers' actions were all consistent with the idea that they merely were trying to restrain a violent individual." *Id.* at 324.

The analysis and result in *Wagner* simply cannot be squared with the decision below. The Tenth Circuit questions the force and duration of police tactics moment-by-moment without appreciating the viewpoint of the police officers at the scene, and essentially requires officers to presume a high risk of positional asphyxia in every case. *See* Pet. App. 14a (stating that "a reasonable officer would have

known that pressure placed on Mr. Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death."). The Fifth Circuit, on the other hand, affords police greater deference and does not find deadly force where factors creating an increased risk of positional asphyxia would not have been apparent to police. *See also Castillo v. City of Round Rock*, 177 F.3d 977 (5th Cir. 1999) (unpublished) (finding no excessive force where police and bystanders subdued a violent pedestrian interfering with traffic by forcing him to the ground face down, applying handcuffs and leg restraints, and kneeling on his back for four to six minutes and neck for five to ten minutes, resulting in his death). Both approaches cannot be correct, and the Fifth Circuit likely would have found no liability in this case.

3. The Third Circuit also has, albeit in an unpublished decision, deferred to police when the restraint of an aggressively resistant arrestee results in positional asphyxiation. In *Bornstad v. Honey Brook Township*, 211 F. App'x 118 (3d Cir. 2007), the court upheld as objectively reasonable the actions of police officers who, when attempting to arrest an intoxicated, belligerent husband for domestic violence, forced the arrestee to the ground and knelt on his chest while awaiting backup, resulting in his asphyxiation. Citing the admonition against 20/20 hindsight from *Graham*, and relying on the Fifth Circuit's decision in *Wagner*, the court sided with police because "[t]he undisputed circumstances here were that the officers were confronted with an uncooperative, intoxicated, and physically imposing

individual suspected of domestic violence on a dark, rainy evening." *Id.* at 124.

Critically, at the point where officers took the arrestee down and kneeled on his chest, "[t]he struggle had escalated to the point where such restraints were appropriate, and Bornstad himself was the cause of the escalation." *Id.* at 125. As much could be said about Weigel in this case, Pet. App. 6a (Weigel "fought vigorously [with the officers and bystanders], attempting repeatedly to take the troopers' weapons and evade handcuffing"); accordingly, the Third Circuit would not likely have ruled as the Tenth Circuit did here.

4. The Seventh Circuit, too, has wielded a substantially lighter touch in a positional asphyxia case than did the decision below. In *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 588-90, 593-94 (7th Cir. 1997), the court found no excessive force where police held in a prone position, knee on back, an obese, violent hotel tenant who had been evicted, refused to leave, struggled with police before being hand-and-leg-cuffed, and died from positional asphyxia. Notably, while the decision below faulted Trooper Broad for not getting off Weigel's back once Weigel was sufficiently restrained for Trooper Henderson to return to his cruiser, in *Phillips* the court gave the benefit of the doubt to police in a similar situation: "Officer Riley placed just enough weight on Mr. Phillips to keep him from rolling over and kicking. If she had not held Mr. Phillips down . . . Mr. Phillips could have gotten up again and would have been a danger to himself, the officers and the hotel employees." *Id.* at 593. *Cf.* Pet. App. 35-36a (O'Brien, J. dissenting) ("It would have been folly for

Broad to assume Weigel had given up the fight simply because his struggle waned or to assume the restraints would be sufficient to prevent or contain another violent outburst if Weigel were rolled on his side or permitted to sit up.").

Furthermore, unlike the Tenth Circuit below, the court in *Phillips* was unwilling to deem police action "deadly force" simply because it resulted in positional asphyxiation. *Phillips*, 123 F.3d at 593; Pet. App. 20a (referring to Broad and Henderson's actions as "deadly force"). Hence, the Tenth Circuit's treatment of police action is inconsistent with the deference employed in *Phillips*.

Other cases from the Seventh Circuit, however, demonstrate less tolerance for police conduct resulting in death in the midst of an evolving situation. In *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005), the court permitted jury scrutiny of the exact level of force deployed by police. There, police restrained Jamal Mohamed, a Somali immigrant who, while having a psychotic episode owing to Post-Traumatic Stress Disorder, ran into traffic, attacked a good samaritan, and swung his belt wildly at the first-responding police officer. *Id.* at 764-65. When backup arrived, officers forced Mohamed to the ground and, when he continued to resist, restrained his arms and legs. *Id.* at 765. One officer knelt on Mohamed's shoulder or back for 30-45 seconds, during which time Mohamed stopped breathing and eventually died. *Id.* at 765-66.

The court ruled that, even where the arrestee is violent, "the reasonableness of kneeling on a prone

individual's back during an arrest turns, at least in part, on how much force is applied." *Id.* at 771. More particularly, "kneeling with just enough force to prevent an individual from 'squirming' or escaping might be eminently reasonable, while dropping down on an individual or applying one's full weight (particularly if one is heavy) could actually cause death." *Id. See also Richman v. Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008) (denying qualified immunity where officers piled on a morbidly obese person who refused to leave a courtroom); *cf. Sallenger v. Oakes*, 473 F.3d 731, 742 (7th Cir. 2007) ("[A] reasonable officer would have known that administering closed-fist punches and flashlight blows, including ones to the head, after the arrestee was handcuffed, continuing to strike him after he had stopped resisting arrest and failing to place him in the proper position after hobbling him violated the individual's Fourth Amendment right to be free from excessive force.").

Underscoring the general lack of agreement among circuit judges over these matters, Judge Evans dissented in *Abdullahi*, criticizing the majority for ignoring "the well-established rule that a police officer's conduct in a struggle like the one that occurred here must be judged from the perspective of a reasonable officer on the scene, not the '20/20 vision of hindsight.'" *Abdullahi*, 423 F.3d at 776 (quoting *Graham*, 490 U.S. at 395).

* * *

As these cases show, the approach of the Tenth Circuit in its ruling below is irreconcilable with

positional asphyxia cases from the Eleventh, Fifth and Third Circuits, and is in considerable tension with the approach of the Seventh Circuit, at least in some circumstances. Nor is this doctrinal confusion surprising. In *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (1998), a positional asphyxia case, the Fifth Circuit observed that, "[a]lthough guns represent the paradigmatic example of 'deadly force,'" the Court has "failed to address whether other police tools and instruments can also be characterized as 'deadly force.'" Accordingly, "[l]ower courts since have struggled with whether to characterize various police tools and instruments as 'deadly force.'" *Id.* at 446. Plainly, that is a call for further guidance from the Court.

### B. Lower courts treat common factors differently, and not even the most predictive factual circumstance can explain the result below

The cases discussed above are just a few examples of where federal courts have analyzed whether police action resulting in positional asphyxiation is either excessive under the Fourth Amendment or entitled to qualified immunity. They usefully illustrate the overall confusion, uncertainty, and conflict that characterize the body of positional asphyxia cases.

In the chart included as Appendix A, the *amici* states have collected 35 cases from both circuit and district courts addressing positional asphyxia issues and noted whether they contained any of several characteristics common to such cases. First, under the general heading of "Aggravating Circumstances,"

the chart records whether officers used chemical spray, cuffed the arrestee behind his back, placed the arrestee face down on the ground, hog-tied the arrestee, transported the arrestee face down, heard vocal sounds of distress from the arrestee, or used weight to compress the chest of the arrestee.

Under that same general heading, the chart also notes whether the arrestee exhibited to a reasonable observer any of the following characteristics that increase the risk of positional asphyxia (as paraphrased from the decision below, *see* Pet. App. 44a): (a) obesity or protruded abdomen; (b) mental illness, in particular, manic depression and extreme agitation, hallucinations and paranoia; (c) drug/alcohol intoxication; (d) excited delirium/cocaine-induced bizarre behavior; (e) panic or violent struggle once restrained.

Next, the chart notes, under the general heading "Mitigating Circumstances," whether the situation was rapidly evolving or urgent and whether the arrestee was resisting officers when they employed the force that resulted in asphyxiation.

Finally, under the column headed "Possible Violation," the chart records the result in the case by noting "Yes" when the court either found excessive force or permitted the question to go to the jury, and "No" where it found no excessive force as a matter of law. The chart does *not* record how the question of qualified immunity was resolved in each case.

Even a cursory review of the chart suggests no consistent patterns leading to either a "Yes" or a

"No," which suggests an overall lack of consistent treatment of these common factors. Digging deeper, regression analysis shows that, of the fourteen common factors charted, only one—"rapidly evolving/urgent"—has a statistically significant correlation (and an inverse one at that) to the determination of "Possible Violation." The graph included as Appendix B shows that all other charted independent variables fail to show statistical significance at the 95% confidence level.[2]

These statistical observations are important for at least two reasons. First, the lack of any positively correlated common aggravating factors concretely demonstrates, over a statistically significant dataset, the lack of consistent treatment of common factual circumstances that arise in positional asphyxiation cases. This phenomenon in turn underscores the need for the Court to take a positional asphyxiation case in order to determine what courts should be looking for when deciding whether police have crossed the line.

Second, the statistically significant inverse correlation of the "rapidly evolving/urgent" factor to the determination of a possible violation highlights the anomaly of the decision below. That is, in an area of law with few common determinative factors,

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[2] Counsel for the *amici* states are grateful for the assistance of Thomas Bodin, Chief Economist for the Attorney General of Indiana, who conducted this regression analysis. Documentation of Bodin's analysis remains on file with the Office of the Attorney General of Indiana.

the Tenth Circuit in this case found unpersuasive the one factor—whether the situation police faced was rapidly changing or urgent and thus required split-second decisions—that has most commonly led other courts to find that no excessive force was used. This observation demonstrates fundamental disagreement between the decision below and other courts as to what is important in positional asphyxia cases. The Court's intervention is therefore warranted.

## II. Review is Justified Because The Decision Below Will Deter Police From Implementing Progressive Force Training Methods

The Court has in recent years relied on police agency regulations to reinforce independent legal conclusions that a particular Fourth Amendment right against excessive force is well-established. In *Groh v. Ramirez*, 540 U.S. 551, 564 n.7 (2004), the Court used a police agency's internal guideline to "underscore" that an officer was on notice of the unlawfulness of his conduct. And in *Hope v. Pelzer*, the Court relied on formally promulgated Department of Correction regulations mandating that hitching-post punishment be carefully monitored and used only in specified situations. 536 U.S. at 744 (2002).

The Court has been careful not to suggest, however, that internal policies or regulations can themselves be the source of "well established" rights. In *Groh*, the Court expressly disclaimed any intention to "suggest that an official is deprived of qualified immunity whenever he violates an internal

guideline." *Groh*, 540 U.S. at 564 n.7. The Court went further in *Virginia v. Moore*, __U.S. __, 128 S.Ct. 1598, 1605 (2008), stating that "[w]e thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule. While those practices 'vary from place to place and from time to time,' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'" (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)). The Tenth Circuit's reliance on police training to find a clearly established constitutional right contravenes this doctrine and undermines police agencies' efforts to train officers on the progressive use of legal force.

### A. Clearly established rights must come from specific prior holdings or universal values, not police training materials

The decision below expressly eschewed reliance on its prior decision in *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), a hog-tie case, as the basis for its conclusion that Troopers Broad and Henderson violated Weigel's clearly established rights. "*Cruz* turns out to be highly relevant to this case," the court explained, "*but not for its legal teaching*." Pet. App. 20a (emphasis added). It was important instead because it "was apparently the reason for . . . extensive WLEA training on positional asphyxia . . . ," *id.*, warning that inflicting pressure on the back of some individuals laying face down may pose the risk of positional asphyxia. *Id.* at 9a. Such training was in turn important because, the court asserted without citation, "the reasonableness

of an officer's actions must be assessed in light of the officer's training." Pet. App. 20a. Here, "the defendants' training informed them that the force they used upon Mr. Weigel produced a substantial risk of death." *Id.* And, "[b]ecause it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself, the defendants' unnecessary use of deadly force violated clearly established law." *Id.* *Quod erat demonstrandum*, according to the court.

One problem with this logic, of course, is that it ignores the Court's repeated admonition that clearly established rights must be evaluated at a high level of specificity, not a high level of generality. *See, e.g.*, *Hope*, 536 U.S. at 740-741. It is clearly established that "deadly force" violates Fourth Amendment rights when unnecessary, but that general proposition says little about the *ex ante* reasonableness of a restraining technique that happens to cause death in a particular circumstance. What is more, repairing to an officer's training to show that special risks sometimes accompany the technique at issue belies any suggestion of "obvious" illegality, for which training would seem to be unnecessary. The obvious illegality of the hitching post in *Hope* owed not to empirically demonstrated injuriousness in particular circumstances, but to the implicit human degradation that *always* accompanies its use as punishment. *Hope*, 536 U.S. at 745. In this case, not even the two judges comprising the majority could agree that kneeling on an aggressor's back to gain control is illegal in *all* circumstances—much less obviously so. *See* Pet.

App. 22a, (Hartz, J. concurring) (stating that it was not "unreasonable of the officers to keep him in a prone position with weight on his upper back so long as the only restraint on his legs was the weight of a bystander sitting on them.")

Not surprisingly, the idea of using police training materials to find clearly established rights has engendered its own lower-court uncertainty and disagreements. In *Abdullahi,* 423 F.3d at 772, the court said that, while violations of standard police practices were "not dispositive," evidence of such were relevant to the reasonableness inquiry. Another court ruled that "the legal analysis under the Fourth Amendment is based on the objective reasonableness standard, and not whether an officer follows departmental policies." *Galvan v. City of San Antonio*, No. SA-07-CA-371-OG, 2008 WL 5352945 at *11 (W.D. Tex. Dec. 19, 2008). Even a prior panel of the Tenth Circuit held that, just because "an arrest violated police department procedures does *not* make it more or less likely that the arrest implicates the Fourth Amendment, and evidence of the violation is therefore irrelevant." *Giannetti v. City of Stillwater*, 216 F. App'x 756, 766 (10th Cir. 2007) (quoting *Tanberg v. Sholtis*, 401 F.3d 1151, 1163-64 (10th Cir. 2005)); *but see Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (holding that police training materials were "relevant not only to whether the force employed . . . was objectively unreasonable . . . but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable").

By taking this case, the Court can head off further lower-court conflict over the use of training materials to establish Fourth Amendment rights, and at the same time reinforce the proper level of specificity of prior holdings or obviousness required to overcome qualified immunity.

### B. Linking Fourth Amendment reasonableness with police training provides disincentives for police agencies to train their officers in the use of progressive force techniques

The decision below held that "the reasonableness of an officer's actions must be assessed in light of the officer's training." Pet. App. 20a. A rule linking reasonableness under the Fourth Amendment to the specifics of police training is not only without doctrinal foundation, but ultimately undermines the salutary effects of training modules that stress progressive uses of force. It effectively punishes agencies that teach officers about the risks associated with various methods of restraint that are presumptively legal under the Fourth Amendment. Far from being a deterrent to unreasonable police conduct, the Fourth Amendment would become a deterrent to educated, informed, and tempered uses of force.

1. The "deliberate indifference" standard of the Fourteenth Amendment requires minimal training for police. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the

police come into contact."). Police agencies routinely go well beyond this constitutional minimum, however, because the "inappropriate use of force by peace officers can drive a wedge between peace officers and the communities they serve. History has recorded how incidents of misconduct in the application of force can spark widespread civil unrest." Illinois Law Enforcement Training and Standards Bd., Evaluation of Guidelines for Use of Force Training 3 (June 2007).

Police agencies across the country thoroughly educate their officers concerning the risks associated with various types of legal force. The training guidelines set forth by the state of Illinois, for example, inform officers that the most appropriate tactics with aggressive assailants are punches, kicks and other striking techniques, impact tools, take-downs directed at the skeletal structure of the body, and non-lethal weapons, but that the detainee could suffer injuries such as lacerations, minor broken bones, chipped teeth, connective tissue damage, and bruising with such force. *Id.* at 10; *see also*, *e.g.*, Florida Dep't of Law Enforcement, Defensive Tactics Curriculum: Legal and Medical Risk Summary 11 (June 2002) (detailing the likelihood of injuries to both officers and subjects from the use of various police defensive techniques); Wisconsin Dep't of Justice Law Enforcement Standards Bd., Defensive and Arrest Tactics 46 (April 2002) (providing detailed instructions on how best to stabilize a detainee prior to handcuffing and disclosing attendant risks).

In light of such risks, many police agencies train officers to escalate force only as necessary as a situation progresses. *See, e.g.*, Denver Police Dep't, Operations Manual: 105.00 – Use of Force 105-1 (March 2006) ("Officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the level of force necessary in a given situation."); Wisconsin Dep't of Justice Law Enforcement Standards Bd., Defensive and Arrest Tactics 5 (April 2002) (reminding officers that "[a]chieving your objective by verbal persuasion is always preferable to having to use physical intervention.").

Some manuals even contain a "use of force" continuum showing the most appropriate tactics to use as the situation escalates. *See, e.g.*, Cincinnati Police Dep't, Use of Force 8 (April 2007) ("Depending on the circumstances, officers may find it necessary to escalate and de-escalate the use of force by progressing up and down the force continuum."); El Paso County Sheriff's Office, Policy and Procedure Manual: Use of Force 4 (July 2006) (six-level range-of-response continuum).

Understandably, however, many police agencies are sensitive about how their training manuals may be used in court, and therefore include in their manuals disclaimers of intent to confer rights or create evidence of a higher standard of reasonableness. *See, e.g.,* Iowa City Police Dep't, Gen. Order No. 00-03: Less Lethal Impact Munitions 5 (May 2007) ("The department policy should not be construed as a creation of a higher legal standard of safety or care in an evidentiary sense with respect to

third-party claims."). If the Court does not address the risk that such manuals may become legal ammunition against the officers they train, police agencies will face a substantial disincentive to train restraint beyond what the "deliberate indifference" standard already requires. The Court should therefore take this case to address whether reasonableness under the Fourth Amendment—"clearly established" or otherwise—may properly be derived from police training procedures and policies.

2. Finally, using law enforcement training manuals to identify "clearly established" constitutional rights could contravene Court precedents as to particular uses of force. Some agencies train officers not to ram a vehicle's bumper to end a dangerous pursuit. *See, e.g.*, Hawaii Police Dep't, Gen. Order No. 602: Motor Vehicle Pursuit 2 (May 1991); Indiana State Police, Standard Operating Procedure. Pursuit/Emergency Driving and Roadblocks 5 (July 2001); El Paso County Sheriff's Office, Policy and Procedure Manual: Vehicle Pursuits 2 (July 2006); Kansas City, Mo. Police Dep't, Procedural Instruction: Pursuits and Emergency Police Vehicle Operation 7 (March 2004).

Some similarly forbid all roadblocks. *See, e.g.*, Hawaii Police Dep't, Gen. Order No. 602: Motor Vehicle Pursuit 2 (May 1991); El Paso County Sheriff's Office, Policy and Procedure Manual: Vehicle Pursuits 2 (August 2006); Kansas City, Mo. Police Dep't, Procedural Instruction: Pursuits and Emergency Police Vehicle Operation 1 (November 2006).

To say the least, it would be anomalous if such training and policies could imply "clearly established" constitutional rights against bumper-ramming in light of *Scott v. Harris*, 550 U.S. 372 (2007) (upholding bumper-ramming as reasonable), or against roadblocks in light of *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (implying some roadblocks would be permissible, but invalidating the one at issue); and *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (stating that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.").

But back-door avoidance of the Court's precedents upholding particular types of force may be exactly where courts such as the Tenth Circuit are logically headed. The Court should intercede to address whether that is the proper course.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 10, 2009

APPENDIX A

Positional Asphyxia Cases

| | CASES | CASE CHARACTERISTICS | | | | | | | | | | Possible Violations |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Aggravating | | | | | | | | Mitigating | | |
| | Circuit Courts | Chemical Spray | Cuffed | Face Down | Hog Tie | Transport | Vocal Distress | Weight compress | Obs. Risk Factors | Rapidly Evolving/ Urgent | Resist | |
| CA 5 | *Bornstad v. Honey Brook Township*, 211 Fed.Appx. 118 (3d Cir. 2007) | ✓ | ✓ | | | | ✓ | ✓ | c, e | ✓ | ✓ | No |
| CA 5 | *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir.1998) | | | ✓ | ✓ | ✓ | | | c, d, e | | ✓ | Yes |
| CA 5 | *Castillo v. City of Round Rock*, 177 F.3d 977 (5th Cir. 1999) | | ✓ | ✓ | | | ✓ | ✓ | a, c, e | ✓ | ✓ | No |
| CA 5 | *Wagner v. Bay City*, 227 F.3d 316 (5th Cir.2000) | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | | ✓ | ✓ | No |
| CA 6 | *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004) | ✓ | ✓ | ✓ | | | | ✓ | b, e | | ✓ | Yes |
| CA 6 | *Jones v. City of Cincinnati*, 521 F.3d. 555 (6th Cir. 2008) | ✓ | ✓ | ✓ | | | | ✓ | c, e | | | Yes |
| CA 7 | *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997) | | ✓ | ✓ | | | | | a, b, e | ✓ | ✓ | No |
| CA 7 | *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005) | | ✓ | ✓ | | | | ✓ | b, e | ✓ | ✓ | Yes |
| CA 7 | *Sallenger v. Oakes*, 473 F.3d 731 (7th Cir. 2007) | ✓ | | ✓ | ✓ | | | | a, b, d, e | ✓ | ✓ | Yes |
| CA 7 | *Richman v. Sheahan*, 512 F.3d 876 (7th Cir. 2008) | | ✓ | ✓ | | | ✓ | ✓ | a, e | | ✓ | Yes |

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| | CASES | CASE CHARACTERISTICS | | | | | | | | | | Possible Violations |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Aggravating | | | | | | | | Mitigating | | |
| | Circuit Courts | Chemical Spray | Cuffed | Face Down | Hog Tie | Transport | Vocal Distress | Weight compress | Obs. Risk Factors | Rapidly Evolving/ Urgent | Resist | |
| CA 9 | *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, (9th Cir. 2003) | | ✓ | ✓ | | | ✓ | ✓ | b | | | Yes |
| | *Arce v. Blackwell*, 294 Fed.Appx. 259 (9th Cir.2008) | | | ✓ | | | ✓ | ✓ | d | | | Yes |
| CA 10 | *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) | | | ✓ | ✓ | | | | b, d | | ✓ | Yes |
| | *Estate of McIntire v. City of Boulder*, 61 Fed.Appx 639 (10th Cir. 2003) | ✓ | | ✓ | ✓ | | | ✓ | c | ✓ | ✓ | Yes |
| | *Giannetti v. City of Stillwater*, 216 Fed.Appx. 756 (10th Cir. 2007) | | ✓ | ✓ | | | ✓ | ✓ | a, b, e | ✓ | ✓ | No |
| | *Broad v. Weigel*, 544 F.3d 1143 (10th Cir. 2008) | | ✓ | ✓ | | | | ✓ | c, e | ✓ | ✓ | Yes |
| CA 11 | *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996) | | ✓ | ✓ | | ✓ | | | b | | ✓ | No |
| | *Garrett v. Athens-Clarke County, Georgia*, 378 F.3d 1274 (11th Cir. 2004) | ✓ | | ✓ | ✓ | | | | e | ✓ | ✓ | No |
| | *Lewis v. City of West Palm Beach*, 2009 WL 606546 (11th Cir. 2009) | | | ✓ | ✓ | | ✓ | ✓ | d, e | ✓ | ✓ | No |

| CASES | CASE CHARACTERISTICS | | | | | | | | | | Possible Violations |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Aggravating | | | | | | | | Mitigating | | |
| District Courts | Chemical Spray | Cuffed | Face Down | Hog Tie | Transport | Vocal Distress | Weight compress | Obs. Risk Factors | Rapidly Evolving/ Urgent | Resist | |
| *Estate of Bryant v. Buchanan*, 883 F.Supp. 1222 (S.D.Ind.1995) | ✓ | ✓ | ✓ | | | ✓ | ✓ | b | | ✓ | Yes |
| *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998) | ✓ | | ✓ | ✓ | | | ✓ | c, d | ✓ | ✓ | No |
| *Guseman v. Martinez*, 1 F.Supp.2d 1240, (D. Kansas 1998) | | ✓ | ✓ | | | | | a, e | | ✓ | Yes |
| *Swans v. City of Lansing*, 65 F.Supp.2d 625 (W.D.Mich.1998) | | | ✓ | ✓ | | | ✓ | b | | | Yes |
| *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (S.D.Ohio 1999). | | ✓ | ✓ | | | | ✓ | a, d | | ✓ | Yes |
| *Fernandez v. City of Cooper City*, 207 F.Supp.2d 1371 (S.D.Fla.2002). | ✓ | ✓ | ✓ | | | | ✓ | b, e | ✓ | ✓ | No |
| *Pliakos v. City of Manchester*, 2003 WL 21687543 (D.N.H. 2003) | ✓ | ✓ | ✓ | | | ✓ | ✓ | a, d, e | ✓ | ✓ | No |
| *Marsall v. City of Portland*, 2004 WL 1048127 (D. Or. 2004) | ✓ | | ✓ | ✓ | | ✓ | ✓ | b, c, e | ✓ | ✓ | No |
| *Watkins v. New Castle County*, 374 F.Supp.2d 379 (D. Del. 2005) | ✓ | ✓ | ✓ | | | | ✓ | c, d, e | ✓ | ✓ | Yes |
| *Lewis v. City of Hayward*, 2006 WL 436134 (N.D. Cal. 2006) | ✓ | ✓ | ✓ | | | | ✓ | c, d, e | ✓ | ✓ | Yes |

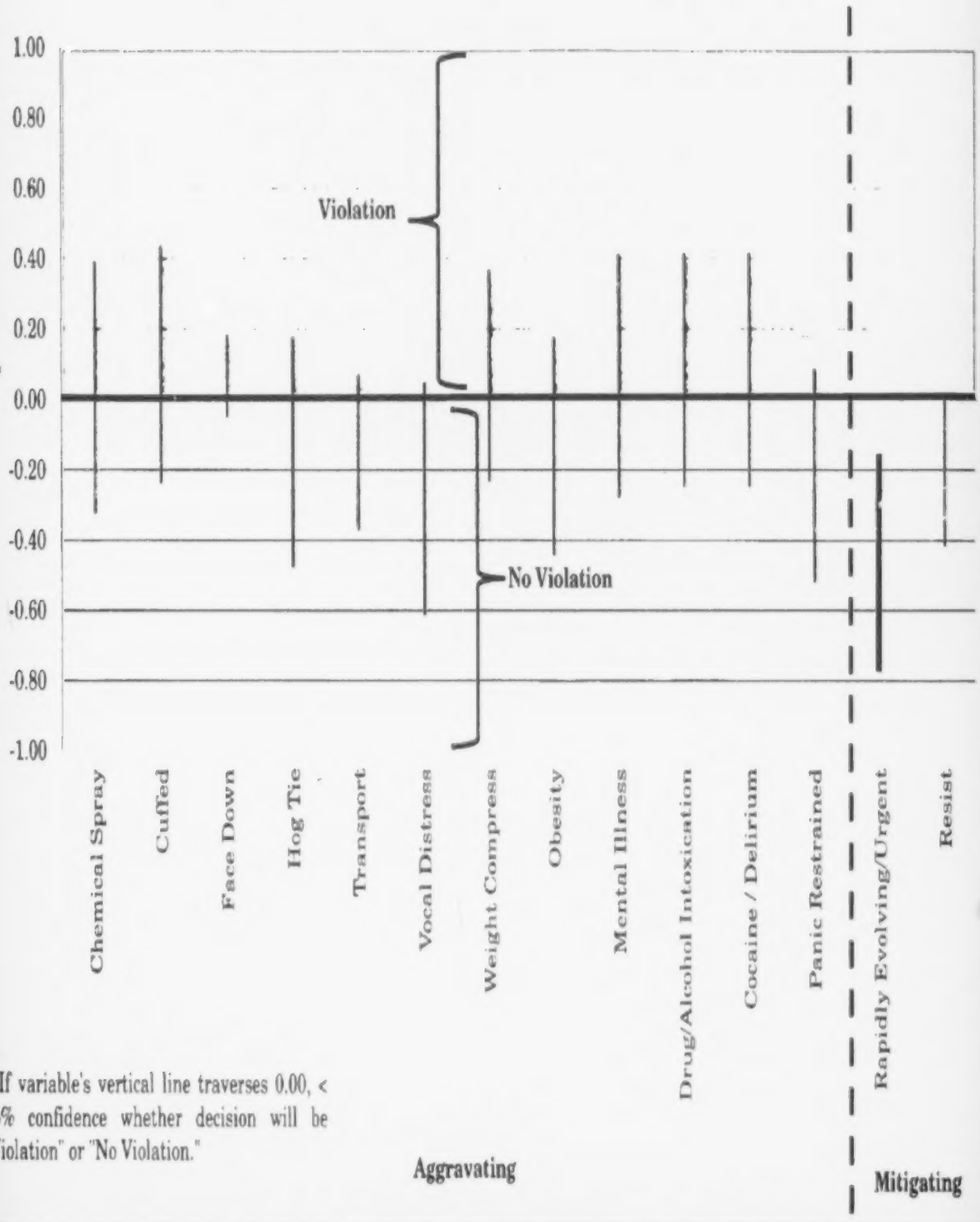
| CASES | CASE CHARACTERISTICS | | | | | | | | | | Possible Violations |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Aggravating | | | | | | | | Mitigating | | |
| District Courts | Chemical Spray | Cuffed | Face Down | Hog Tie | Transport | Vocal Distress | Weight compress | Obs. Risk Factors | Rapidly Evolving/ Urgent | Resist | |
| *Pirolazzi v. Stanbro*, 2008 WL 1977504 (N.D. Ohio 2008) | | ✓ | ✓ | | | ✓ | ✓ | b, d, e | ✓ | ✓ | Yes |
| *Hill v. Carroll County*, 2008 WL 2066526 (N.D. Miss. 2008) | | | ✓ | ✓ | ✓ | | | a, e | | ✓ | No |
| *Vera v. City of Allen*, 2008 WL 4500645 (E.D. Tex. 2008) | ✓ | ✓ | ✓ | | | ✓ | ✓ | e | ✓ | ✓ | Yes |
| *Galvan v. San Antonio*, 2008 WL 5352945 (W.D. Tex. 2008) | ✓ | ✓ | ✓ | | | ✓ | ✓ | d, e | ✓ | ✓ | No |
| *Lee v. Metropolitan Government of Nashville and Davidson Co*, 2009 WL 211051 (M.D. Tenn. 2009) | ✓ | ✓ | ✓ | | | | ✓ | c, d, e | | ✓ | Yes |
| *Ramos v. Lucio*, 2009 WL 700635 (S.D.Tex. 2009) | | | ✓ | ✓ | | | ✓ | d, e | ✓ | ✓ | No |

Observable Risk Factors:

a. Obesity
b. Mental Illness, In Particular, Manic Depression and Extreme Agitation, Hallucinations and Paranoia
c. Drug/Alcohol Intoxication
d. Excited Delirium/Cocaine-induced Bizarre Behavior
e. Panic or Violent Struggle Once Restrained

## Appendix B

**Variable Regression Analysis:** Upper and Lower Bounds by Variable at 95% Confidence Level*




* If variable's vertical line traverses 0.00, < 95% confidence whether decision will be "Violation" or "No Violation."